

STATE OF MICHIGAN
COURT OF APPEALS

MARY ENGEL,

Plaintiff-Appellant,

v

PAULIN BATRA and ELIZABETH MARASH
BATRA,

Defendants-Appellees,

and

AUTO OWNERS INSURANCE COMPANY

Defendant.

UNPUBLISHED

March 27, 2007

No. 267926

Macomb Circuit Court

LC No. 04-000272-NI

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered on a jury verdict of no cause of action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On March 11, 2001, plaintiff's vehicle struck the rear of a vehicle driven by defendant Paulin Batra as both vehicles were northbound on VanDyke Road in Sterling Heights. Plaintiff's complaint alleged that defendant switched lanes in front of her suddenly and then stopped, thereby causing the accident.

Defendants, who were Florida residents at the time this suit was filed, were properly served with the summons and complaint. Defendants failed to file a timely answer, and, pursuant to plaintiff's motion, the circuit court clerk entered a default against both defendants on June 15, 2004. MCR 2.603(1).

An attorney entered an appearance on behalf of the defendants on June 25, 2004. He filed an answer to plaintiff's second amended complaint and plaintiff's motion to enter default judgment on June 28, 2004. The circuit court advised defense counsel that the answer was accepted for filing for information only, because a default had been entered.

Docket entries reflect that a default judgment was entered on June 28, 2004. However, no such judgment is found in the lower court record. As it is axiomatic that courts speak through written orders, *Teidman v Teidman*, 400 Mich 571, 576; 255 NW2d 632 (1977), we find that no default judgment ever entered against either defendant. The initial defense motion to set aside the defaults was unresolved. Moreover, the record shows that neither defendant received notice that a default judgment had entered.

On July 20, 2004, another lawyer representing defendants moved for reconsideration. The circuit court entered an order granting reconsideration and setting aside the default judgment on September 30, 2004. Thereafter, defendants answered plaintiff's second amended complaint.

Trial was held on December 15 and 16, 2004. The jury rendered a verdict of no cause of action. Judgment entered on the verdict on December 29, 2005.

Plaintiff has filed no transcripts of the proceedings in the circuit court. On appeal, plaintiff alleges that it was error for the trial court to have set aside the defaults.

We review the grant or denial of a motion to set aside a default for an abuse of discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

From the record before us it is at least arguable that the trial court abused its discretion in setting aside the defaults. Although defendants offered a proper affidavit of meritorious defense, the showing of good cause was very weak. However, plaintiff never raised this claim in the trial court. After the trial court set aside the defaults, plaintiff proceeded to trial. Now, plaintiff seeks to use the unpreserved error as an appellate parachute and avoid the verdict of the jury.

A party may not harbor error in the circuit court, and then use that unpreserved claim to thwart a verdict. *Sampeer v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963); *In re Gazilla*, 264 Mich App 668, 679; 692 NW2d 708 (2005); *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens